72-1596

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In The

Supreme Court of the United States

October Term 1972

No. 72-1596

SIX FLAGS OVER GEORGIA, LTD., and
GREAT SOUTHWEST ATLANTA CORP.,
Petitioners

v.

PETER J. BRENNAN, Secretary of
Labor, United States Department of Labor,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Errata

Statement "(Exhibit A Omitted)" appearing at p. 33 should appear at p. 29.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 22, 1973.

OPINIONS BELOW

The opinion of the District Court for the Northern District of Georgia is unreported and is set forth at pages 45-50

of the printed Appendix[1] and Appendix "A" hereto. The opinion of the Court of Appeals for the Fifth Circuit, as subsequently supplemented, is likewise set forth in Appendix "A" hereto and is reported in 474 F. 2d 18 and in —— F. 2d —.

JURISDICTION

The judgment of the Court of Appeals was entered February 22, 1973. A supplement to its opinion together with the denial of a timely petition for rehearing *en banc* was entered April 10, 1973; this petition for certiorari is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Where an exemption under the Fair Labor Standards Act of 1938, as amended, applies by its specific terms to any employee employed by a particular type of business establishment, may such an exemption nevertheless be construed to apply only to such employee while he performs certain types of work for such business establishment?

Specifically, is all construction and reconstruction work performed by the employees of an exempt business establishment for such establishment nevertheless to be considered nonexempt work?

(2) Under what circumstances may a court by interpretation alter the plain and unambiguous language of the statutory exemption provisions of the Fair Labor Standards Act to reach what it feels is a desirable social result?

1. References to the printed Appendix are referred to throughout this Petition by the letter "R".

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938 Public Law 89-601, C. 676, 75th Cong., 3rd Sess., 52 Stat. 1060, as amended, 29 U.S. Code §201-219, are set forth in Appendix "B", *infra.* The provisions particularly involved in this case are contained in Section 13(a)(3) which reads as follows:

> "13(a) The provisions of Section 6. . .and Section 7 (governing overtime and minimum wage) shall not apply with respect to— . . .
>
> > "(3) any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year; or . . ."

Other provisions of the Act which involve a common or similar question of statutory construction are Section 13(a)(9) which states that the overtime and minimum wage provisions of the Act shall not apply to:

> "(9) any employee employed by an establishment which is a motion picture theater; or"

Section 13(b)(8) which states that the overtime provisions of the Act shall not apply to:

> "(8) any employee employed by an establishment which is a hotel, motel, or restaurant; or any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the

> aged, or the mentally ill or defective who reside on the premises, and (B) receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or"

Section 13(b)(19) which states that the overtime provisions of the Act shall not apply to:

> "(19) any employee of a bowling establishment if such employee receives compensation for employment in excess of forty-eight hours in the workweek at a rate not less than one and one-half times the regular rate at which he is employed."

See also Sections 13(a)(2) and (4) with respect to the retail and service establishment exemption.

STATEMENT OF THE CASE

Suit was brought by the Secretary of Labor (hereinafter called the "Secretary") against Petitioners to enjoin certain alleged violations of the Fair Labor Standards Act of 1938, as amended, and to compel the payment of overtime to certain employees together with interest thereon; jurisdiction was duly involved (29 U.S.C., §215 and 217). Petitioners answered setting up the minimum wage and overtime exemption of Section 13(a)(3) of the Act [29 U.S.C. 213(a)(3)] as an affirmative and controlling defense. After interrogatories by the Secretary and answers thereto by Petitioners, Petitioners filed a Motion for Summary Judgment supported by the affidavit of Wayne H. Gallagher, a Vice-President (R 16-37), the Secretary filed a Cross-Motion for Summary Judgment and the case went to the District Court

on agreed facts and the following statement of the issue to be decided (R 44):

> "The sole question for decision is as to whether or not this exemption [§13(a)(3)] applies to employees of the amusement park establishment during workweeks in which they spend all or part of their time assisting in the erection of buildings, rides, towers, fences, signs, driveways, walkways, parking lots, or other structures. . . at the place of business known as Six Flags Over Georgia and are not paid time and one-half their regular rate of pay for all hours worked over 40 in a workweek, the parties are in agreement that otherwise the exemption applies."

By order with accompanying findings of fact and conclusions of law (R 45-50 and Appendix "A" hereto) the District Court held as a matter of law that the activities in question are not "characteristic of amusement park operations or the activities of amusement park employees" (a proposition which the Court of Appeals upheld in its supplemental opinion of April 10), that "it is the nature of the work performed which is controlling" (R 48) and gave judgment for the Secretary.

The Court of Appeals affirmed *per curiam* stating:

> "It is the character of the work, not the source of the remuneration, that controls . . . The nature of the Work is what gives rise for the need for an exemption; the exemption is not a subsidy accorded to an employer because of his principal activities".

For this proposition the Court cited its very recent case of *Hodgson v. Colonnades, Inc.*, 472 F. 2d 42 (C.A. 5, 1973), involving substantially the same interpretation with respect to the 13(b)(8) exemption as applied to hotels [29

U.S.C. §213(b)(8)]. Copy of this opinion is attached as Appendix "C".

The uncontroverted facts are set forth in Mr. Gallagher's affidavit (R 16-37) and may be summarized as follows:

One of the Petitioners, Great Southwest Atlanta Corp., operates an amusement park establishment near Atlanta, Georgia, known as Six Flags Over Georgia. This is admittedly a seasonal amusement park establishment within the meaning of the 13(a)(3) Exemption to the Fair Labor Standards Act. The permanent staff includes a regular maintenance crew of some 100 persons consisting of mechanics, fiberglass men, electricians, carpenters, painters, landscape men, general labor, animation men, plumbers, sound men, artists, sign painters and janitors. All of such employees are employed exclusively in connection with the operation of the Six Flags Over Georgia amusement park.

In reliance upon the clear language of the 13(a)(3) exemption, the Company's labor contract with the Carpenter's Union provides for overtime after 50 hours during certain seasons of the year and this same condition applies at Petitioners' sister parks of Six Flags over Texas and Six Flags over Mid-America.

The primary duty of the park's maintenance crew is the repair and maintenance of the existing park establishment. Large numbers of people attend the park and this requires constant activity by the maintenance crew to maintain the park as a safe and pleasant public attraction. As a part of this work and to update park entertainment, new rides are installed, old ones are reworked, new structures are built,

and old structures are rehabilitated, moved and refurbished, new fences are put up, and new walkways are put in. A large amount of this work is contracted out. However, some of the park maintenance crew assist or participate in those types of work which the Secretary deems to be construction or reconstruction of park establishment facilities as contrasted with repair and maintenance of such facilities. The Secretary contends that the 13(a)(3) amusement park exemption does not apply to employees during workweeks in which they do construction or reconstruction work and during which they admittedly do not receive overtime compensation for all hours worked over 40 in a workweek.[2]

The District Court and the Court of Appeals, as above indicated, affirmed the Secretary's position on the broad

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2. While the basis of decision of the Courts below is far broader, the principal contention of the Secretary was that in the light of Section 3(s)(3) of the Act [29 U.S.C. 203(s)(3)] which covers enterprises

"engaged in the business of construction or reconstruction, or both"

All construction and reconstruction work is covered regardless of the business establishment exemptions. This view was supported by the Court of Appeals for the Fifth Circuit in *Hodgson v. Colonnades, Inc.* 472 F. 2d 42, 48-49 (CA5, 1973). However, it is clear that Congress in referring to the "business of construction or reconstruction" was using the term in the normal sense of a construction firm or a construction company and there is no indication that an exempt business establishment that performs incidental construction activities for itself is engaged in the business of construction. Thus, in discussing the original provision in the 1961 amendments the House of Representatives Labor Committee Report (the almost identical language appears in the Senate Labor Committee Report) states:

> "The Committee believes that difficulty could arise in applying the concepts of 'establishment' and 'sales' as contained in the bill as introduced, to the *Construction Industry* which performs its work under contracts and has employees of its contractors at many different job sites. The Committee has deliberately refrained from using these terms in section 3(s)(5). [Later to become 3(s)(3).] Under the bill it is clear that if a *construction contractor* is engaged in construction activities at a number of construction sites, all of these activities will be considered as being performed for the enterprise, and all the employees will come under the Act if the enterprise has an annual volume of business of $350,000 or more." [HR Report No. 75, 87th Congress, 1st Session, March 13, 1961; Emphasis supplied].————

general principle that the character of the work determines all Section 13 exemptions even where the exemption applies by its specific terms to all employees employed by a certain type of business establishment.

REASONS FOR GRANTING WRIT

1. *Conflict in standards of interpretation to be applied in connection with the statutory exemptions.*

This decision and the court's earlier decision in *Hodgson v. Colonnades, Inc.*, 472 F. 2d 42, 46 (CA 5, 1973) are in direct conflict with the standards of construction of the exemption provisions announced by this Court in *Addison et al v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 616-618 (1944); by the 9th Circuit in *McComb v. Hunt Foods, Inc.*, 167 F. 2d, 905, 906, 908 (CA 9, 1948), cert. den. 335 U.S. 845 (1948); by the 1st Circuit in *Mitchell v. Stinson*, 217 F. 2d 210, 214, 215 (CA 1, 1954); and impliedly approved by the 2nd Circuit in *Walling v. Connecticut Co.*, 62 F. Supp. 733 (D.C. Conn. 1945), affirmed 154 F. 2d, 552 (CA 2, 1946), cert. den. 329 U.S. 667 (1947) in that they seek to limit the clear and unequivocal scope of the business establishment exemption to work of a certain nature.

As this Court has pointed out Congress did not elect to extend the Fair Labor Standards Act to the full extent of possible coverage *Kirschbaum Co. v. Walling*, 316 U.S. 517, 521-522 (1942).

The Fair Labor Standards Act, as it is presently constituted, covers practically every type of business enterprise (29 U.S.C. §203(r), §203(s), 206 and 207). Then in Sections

13(a) and 13(b) [29 U.S.C. §213(a) and (b)] the Act spells out no less than thirty-three exemptions. Some depend upon the work of the employee, some depend upon the business of the employer, some extend only to certain segments of a type of business. These exemptions have been built up over the thirty-five years of the Act's existence and through major statutory revisions in 1949, 1961 and 1966. They are carefully delineated. (See Appendix "B", *infra*).

In discussing the proper standards of interpretation with respect to the exemptions under the Fair Labor Standards Act, this Court stated through Mr. Justice Frankfurter (*Addison et al v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607 at 616-618 (1944)—a case overturning the Administrator's definition of "area of production"):

> "The wider a delegation is made by Congress to an administrative agency the more incomplete is a statute and the ampler the scope for filling in, as it is called, its details. But when Congress wants to give wide discretion it uses broad language. Thus, in the Interstate Commerce Act, Congress prohibited a lower rate for a longer than a shorter haul, but it gave an authority to the Interstate Commerce Commission, undefined except as the general purposes of that Act implied the basis for affording exemption, to grant relief from this prohibition. Intermountain Rate Cases (United States v. Atchison, T. & S. F. R. Co.), 234 U.S. 476, 34 S.Ct. 986, 58 L.Ed. 1408. Again in the National Labor Relations Act, Congress gave the Board authority to take such action "as will effectuate the policies of this Act." §10(c), 49 Stat. 449, 454, 29 U.S.C. §160(c), 29 U.S.C.A. §160(c). The "policies" of the Act were so broadly defined by Congress that the determination of "the relation of remedy to policy is peculiarly a matter for administrative competence". Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194,

61 S. Ct. 845, 852, 85 L.Ed. 1271. In the Fair Labor Standards Act, Congress legislated very differently in relation to the problem before us. To be sure the Fair Labor Standards Act like the National Labor Relations Act was based on findings and a declaration of broad policy. But Congress did not prescribe or proscribe generally and then give broad discretion for administrative relief as in the Interstate Commerce Act or for remedies as in the National Labor Relations Act. Congress did otherwise. It dealt with exemptions in detail and with particularity, enumerating not less than eleven exempted classes based on different industries, on different occupations within the same industry, (the classification in some instances to be defined by the Administrator, in some made by Congress itself, in others subject to definition by other legislation), on size and on areas. In short the Administrator was not left at large. A new national policy was here formulated with exceptions, catalogued with particularity and not left within the broad dispensing power of the Administrator. Exemptions made in such detail preclude their enlargement by implication.

"We should of course be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. For we are here not dealing with the broad terms of the Constitution "as a continuing instrument of government" but with part of a legislative code "subject to continuous revision with the changing course of events". United States v. Classic, 313 U.S. 299, 316, 61 S.Ct. 1031, 1038, 85 L.Ed. 1368.

"Legislation introducing a new system is at best empirical, and not infrequently administration reveals

gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.' Commonwealth v. Grunseit (1943) 67 C.L.R. 58, 80. For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense. The idea which is now sought to be read into the grant by Congress to the Administrator to define 'the area of production' beyond the plain geographic implications of that phrase is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

"The details with which the exemptions in this Act have been made preclude their enlargement by implication. While the judicial function in construing legislation is not a mechanical process from which judgment is excluded, it is nevertheless very different from the legislative function. *Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'* Kirschbaum Co. v. Walling, 316 U.S. 517, 522, 62 S.Ct. 1116, 1119, 86 L.Ed. 1638. *To blur the distinctive functions of the legislative and judicial process is not conducive to responsible legislation." [Emphasis Supplied].*

As the Court of Appeals for the Ninth Circuit pointed out in sustaining the first processing exemption (*McComb v. Hunt Foods, Inc.*, 167 F. 2d 905, 906, 908, (CA 9, 1948),

cert. den. 335 U.S. 845 (1948)] "The Fair Labor Standards Act was fashioned to accomplish certain results—to benefit labor and also to make specific beneficial exemption provisions for a certain class of employers defined in the Act." These provisions excepting activities from coverage apply in as full measure as those activities brought within the scope of the Act where supported by adequate proof.

As the Court of Appeals for the First Circuit pointed out in construing the fish canning exemption *(Mitchell v. Stinson*, 217 F. 2d 210, 214, 215 (CA 1, 1954)

> "Upon examination of the exemption contained in §213(b) (4) and upon comparison of it with the other exemptions contained in §213 it can be seen that the language of the exemptions is not parallel. The difference in terminology employed by Congress strongly indicates that Congress differentiated as to whether employees were to be exempt because they were employed by a particular employer, employed in a particular capacity, employed in a particular industry, or employed in connection with a particular industry. Thus, where the words 'any employee of a carrier by air * * *'; 'any employee employed by any retail or service establishment * * *'; 'any employee of a street, suburban, or interurban electric railway * * *'; and 'any employee of an employer engaged in the business of operating taxicabs' are used, it is the nature of the employer's business which is determinative as to whether or not a particular employee is to be included within the exemption."

The District Court for the District of Connecticut considered a similar question in connection with an exemption which applied to "any employee of a . . . local trolley or motor bus carrier." The defendant operated a trolley and bus line and also a powerhouse. The question for decision was whether the exemption applied to the powerhouse em-

ployees. The Government argued that the exemption applied only to vehicular drivers and not to powerhouse employees.

"Since only about ten percent of all local trolley lines . . . manufacture their own power (and accordingly) the powerhouse operation is not an essential or usual part of local trolley . . . business."

The Court struck this argument down on the ground that there was no limitation in the exemption. "Were there no other uses of the power produced than in the operation of the trolley lines the exemption would apply." Judgment was given for the Government only on the ground that a substantial portion of the power produced was sold to customers in the regular course of an electric utility business. [*Walling v. Connecticut Co.*, 62 F. Supp. 73 (D.C. Conn. 1945); affirmed 154 F. 2d 552 (CA 2, 1946); cert. den. 329 U.S. 667 (1947)].

It is further to be noted that the broad and unrestricted scope of the establishment exemption when applied to a particular business was fully recognized by the Administrator of the Wage and Hour Division in his Interpretative Bulletin No. 6 wherein he dealt with the original unrestricted retail and service establishment exemption. This bulletin provides as follows:

"1. Section 13(a)(2) of the Act grants an exemption from the minimum wage provisions of section 6 and the maximum hour provisions of section 7, as follows:

'The provisions of section 6 and 7 shall not apply with respect to * * * any employee engaged in

any retail or service establishment the greater part of whose selling or services is in intrastate commerce****

"5. It should be noted that the test prescribed in sections 6 and 7 is related to the nature of employment of the particular *employee*. The criterion used in section 13(a)(2), on the other hand, is the nature of the establishment in which the employee is engaged. Thus, under sections 6 and 7 *some* employees of a given industry or of a given employer may be covered and others may not be covered. If, however, the exemption provided by section 13(a)(2) is applicable because the greater part of the selling or servicing of the retail or service establishment is in intrastate commerce, *all* employees engaged in the establishment are exempted from sections 6 and 7." [Emphasis not supplied; appears in original bulletin].

This interpretation has never been departed from, although the current interpretative bulletin is less explicit (29 CFR §779. 302 and §779.308) and the Secretary argues for a different application of its current language.

2. *An important question of Federal Law is involved which should be settled by this Court; failure of the Courts below to follow established and usual course of judicial proceedings.*

An important question to be decided is whether the Courts below were correct in holding that business establishment exemptions of the Fair Labor Standards Act can be restricted to certain types of work performed for it by the establishment's employees. The holding of the Court below that "it is the character of the work, not the source

of remuneration that controls" effectively destroys the broad scope of the business establishment type of exemption that Congress has fashioned over some thirty-five years and throws into question the application of such an exemption to many thousands of employees and thousands of employers, particularly in the hotel, motel, restaurant, amusement park, motion picture theater, nursing home and bowling alley industries who have relied for years without question on the clear and unambiguous terms of the business establishment exemption.[3] This is a question of great and recurring significance.

Of equal importance is the assumption of the Court below that it has not only the right but the duty to restrict plain and unambiguous statutory provisions in the interest of broad social purpose and the general admonitions of this Court that exemptions to the Fair Labor Standards Act "must be narrowly construed" [*Hodgson v. Colonnades, Inc.*, 472 F. 2d, 42, 47 (CA 5, 1973)].[4] This goes to the whole question of the proper standards of statutory construction.

The failure of the Court below to recognize the proper and established standards of statutory construction repre-

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[3]For example in discussing the amusement park exemption, the Labor Law editors of Commerce Clearing House state:

> "For purposes of the exemption for employees of seasonal amusement or recreational establishments, it does not matter how large the establishment's annual volume of business is *or what duties are performed by the individual employees.* An establishment which is a covered enterprise or part of a covered enterprise is no less entitled to the benefit of the exemption than a non-enterprise establishment." C.C.H. Labor Law Reporter, 1 Wages and Hours §25,223 [Emphasis supplied].

[4]This Court stated in the case of *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490 at 493 (1945), wherein the definition of establishment was first delineated: "Any exemption from such humanitarian and remedial legislation must therefor be narrowly construed, *giving due regard to the plain meaning of statutory language and the intent of Congress.*" [Emphasis Supplied]

sents a grave departure from the established and usual course of judicial proceedings. This is emphasized by the statutory history of the retail and service establishment exemption which together with numerous other arguments were presented to the Court below.

In 1938 the original statute exempted from both the minimum wage and overtime requirements of the Act:

> "Any employee engaged in any retail or service establishment, the greater part of whose selling or servicing is in intrastate commerce."

In 1949, this exemption was amended to exempt from the minimum wage and overtime provisions of the Act:

> "Any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located. A retail or service establishment shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

Thereafter, in 1961, Section 13(a)(2) of the Act was further amended to provide that the minimum wage and overtime provisions of the Act shall not apply to:

> "Any employee employed by any retail or service establishment more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located, if such establishment—
>
> "(i) is not an enterprise described in Section 3(s), or

"(ii) *is in such an enterprise and is a hotel, motel, restaurant, or motion picture theater; or is an amusement or recreational establishment that operates on a seasonal basis, or*

"(iii) *is in such an enterprise and is a hospital or institution which is primarily engaged in the care of the sick, the aged, the mentally ill or defective residing on the premises of such institution,* or a school of physically or mentally handicapped or gifted children, or

"(iv) is in such an enterprise and has an annual dollar volume of sales (exclusive of excise taxes at the retail level which are separately stated) which is less than $250,000.

"A retail or service establishment shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry." [Emphasis supplied].

Thereafter, the statute was further amended in 1966 to state that there is exempted from the minimum wage and overtime provisions of the Act [29 U.S.C. §213(a)(2)],

"any employee employed by any retail or service establishment *except an establishment or employee engaged in laundering, cleaning, or repairing clothing of fabrics, or an establishment engaged in the operation of a hospital institution or school described in Section 3(s)(4),* if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the state in which the establishment is located and such establishment is not an enterprise described in Section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusively of excise taxes at the retail level which are separately stated). [Emphasis supplied].

> "A retail or service establishment shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

At the same time, Congress, having carefully restricted the original broad scope of the retail and service establishment exemption by excepting those businesses covered under Sections 3(s), (2) and (4), gave the seasonal amusement park exemption unrestricted separate status in Section 13(a)(3) of the Act, gave motion picture theaters separate status under Section 13(a)(9) and provided separately for hotel, motel, restaurant and nursing home industries in Section 13(b)(8) of the Act. If Congress had wished to except certain types of work from these exemptions it could have done so, the failure to do so clearly indicates, we urge, the stated congressional purpose to have these exemptions applied according to their terms without resort to the judicial patina of interpretative alteration.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX "A"
OPINIONS IN THE LOWER COURTS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION

NO. 14876

JAMES D. HODGSON

v.

SIX FLAGS OVER
GEORGIA, LTD., ET AL.

ORDER

Plaintiff and defendants have submitted this case to the court on stipulations of fact hereinafter set out. The question to be decided is whether or not §213(a)(3) of the Fair Labor Standards Act (29 U.S.C. §213(a)(3)) exempting employees of amusement and recreational establishments applies to certain employees of the amusement park during those work weeks in which said employees spend all or part of their time assisting in the erection of "buildings, rides, towers, fences, signs, driveways, walkways, parking lots or other structures . . . at the place of business known as 'Six Flags Over Georgia' " and who are not paid time and one-

half their regular rate of pay for all hours worked in excess of 40 during a work week. Plaintiff and defendants have stipulated that the exemption of §13(a)(3) does apply in all other situations involving the employees of said amusement park.

FINDINGS OF FACT

The parties have stipulated the following facts:

"1. Defendant Great Southwest Atlanta Corp. operates an amusement park near Atlanta, Georgia, known as 'Six Flags Over Georgia.' The park operation is seasonal. It operates on weekends during April and May, seven days a week from June through Labor Day, and on weekends from Labor Day until the park closes at Thanksgiving. Over 90% of the park's receipts are made during the six peak operating months.

"2. Great Southwest Atlanta Corp., as general partner of the limited partnership known as Six Flags Over Georgia, Ltd. is operating an amusement or recreation establishment known as Six Flags Over Georgia; employees are employed by said amusement or recreational establishment who are engaged in commerce, including employees handling or otherwise working on goods which have been moved in or produced for commerce. Said amusement or recreation establishment is part of an enterprise within the meaning of section 3(s) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. §203(s)). Six Flags Over Georgia is an amusement or recreational establishment within the meaning of §13(a)(3) of the Act [29 U.S.C. §213(a)(3)].

"3. The park was built during 1966 and 1967 at a total construction cost of some twelve million dollars and annually entertains almost two million guests. During the park season the park employs some 1,625 workers, but the permanent work force is approximately 215, of which some 100 are maintenance employees such as gardeners, painters, carpenters, electricians, plumbers, janitors, laborers, and so forth. All of these are employed by Great Southwest Atlanta Corp. exclusively in connection with the Six Flags Over Georgia park operation. It is certain that members of the maintenance employee group as set forth in Exhibit B to Defendants' Answers to Plaintiff's Interrogatories, which is incorporated herein by reference, are the subject of this litigation.

"4. The maintenance employees are covered by a collective bargaining agreement with Industrial Local Union No. 2546, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, which covers wages, hours, and working conditions and provides, among other things, that:

> 'Time and one-half the employee's regular hourly rate of pay will be paid for all hours worked in excess of forty in a work week during those work weeks commencing with Labor Day and ending with the last work week before April 15. Time and one-half the employee's regular hourly rate of pay will be paid for all hours worked in excess of fifty in a work week during all other work weeks (i.e., for those work weeks falling between the last full work week prior to April 15 and Labor Day).'

Similar provisions are to be found in the labor agreements which cover the two amusement parks operated by defendants' affiliates and known as Six Flags Over Texas and Six Flags Over Mid-America respectively.

"5. The maintenance employees maintain the grounds, rides, buildings and other attractions in the park in order to keep the park safe for and attractive to the public. In addition, from time to time in order to keep the park safe for and attractive to the public, new rides are installed, old ones are reworked, new fences are put up, new structures are built and old ones are remodeled or refurbished, as described in Exhibit A to Defendants' Answers to Plaintiff's Interrogatories, which is incorporated herein by reference. A large portion of this work is contracted out and most of the work is done during the off season; however, as is detailed in the answers to the plaintiff's interrogatories and in defendants' affidavit in support of its Motion for Summary Judgment, some of this work is done during the park season and some of the maintenance crew may perform or assist in this work."

CONCLUSIONS OF LAW

Section 13(a)(3) of the Fair Labor Standards Act (29 U.S.C. §213(a)(3)) provides that the minimum wage and overtime provisions of the Act shall not apply to:

> "any employee employed by an establishment which is an amusement or recreational establishment, if (A) It does not operate for more than seven months in any calendar year, or (B) During the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year.

Plaintiff relies heavily on an unreported order from the Southern District of Florida (*Hodgson v. Colonnades, Inc., et al.*, C.A. No. 69-430-Civ-EC dated 7-26-71) wherein the

court held that regular employees of the hotel defendant who were engaged in a constant program of modernization of the hotel facilities (as opposed to mere maintenance and repair as a necessary incident to the operation of the hotel) were not exempt from the minimum wage and overtime provisions of the Act provided for in §13(b)(8) (29 U.S.C. §213(b)(8)).

We think the situation in *Colonnades* is analogous. The construction of amusement park facilities such as rides,' exhibition buildings, refreshment centers and the like are not characteristic of amusement park operations or the activities of amusement park employees. It was the purpose of Congress to include within the coverage of the Act employees of construction contractors who build for themselves as well as for others *(Wirtz v. Allen Green & Associates, Inc.*, 379 F.2d 198 at 200 (6th Cir. 1967)), and it makes no difference whether or not the employer characterizes himself as a construction contractor or not since it is the nature of the work performed which is controlling. *(Shultz v. W. R. Hartin & Son, Inc.*, 428 F.2d 186 at 190 (4th Cir. 1970).

The facts agreed on by the parties show that defendants' employees whose work is at issue herein involved themselves in the business of constructing or reconstructing facilities within the amusement park although included on the payroll of the amusement facility as employees of the amusement park. The designation given such employees by defendants is not controlling; it is the nature of the work performed by such employees which is controlling. *Shultz v. W. R. Hartin & Son, Inc., supra.*

> If the employer regularly and substantially engages in an otherwise non-exempt business other than the one for which the exemption was designed, however, strict construction of the exemption requires that it not be extended to that other business merely because the principal business of the employer is exempted. *To do so would hardly be fair to those who must compete in that other business as their major activity. Walling v. Connecticut Co., 62 F.Supp. 735.* (Emphasis added.)

In *Connecticut Co.*, the defendant (a local trolley carrier) contended that all of its employees were exempted under the provisions of the Act regardless of the work performed even though extraneous to the business of a trolley carrier. In affirming the lower court's holding, the Second Circuit, in commenting upon the defendant's contention, stated that the defendant's position would be a correct literal interpretation of the exemption, but to follow such a literal interpretation would mean that ". . . no matter in what business, however extraneous to its functioning as a 'local trolley carrier' defendant engaged, those employed in that extraneous business would be exempt. The policy of the Act, disclosed in its history, precludes the acceptance of such a literal construction." *Walling v. Connecticut Co.*, 154 F.2d 552 (C.A. 2 1946).

A literal interpretation of the exemption here at issue and upon which defendants rely, would support defendant's contention that even those of its employees engaged in construction activities at the amusement center would be included within the exemption of the Act, but such a reading cannot prevail if it results in the emasculation or deletion of a provision which a less literal reading would preserve. *Markham v. Cabell*, 326 U.S. 404, 409, 66 S.Ct. 193 (1945).

Exemptions under the Act are to be narrowly construed against the employer. *Schultz v. Louisiana Trailer Sales, Inc.*, 428 F.2d 61, 67 (C.A. 5 1970).

The plaintiff's interpretation of employment within a business exempted under the Act supports his contention that the employees here at issue are not entitled to the exemption.

> In order to meet the requirements of actual employment 'by' the establishment, an employee, whether performing his duties inside or outside the establishment, must be employed by his employer in the work of the exempt establishment itself in activities within the scope of its exempt business. (See *Davis v. Goodman Lumber Co.*, 133 F.2d 52 (CA 4) (holding §13(a)(2)inapplicable to employees working in manufacturing phase of employer's retail establishment)); *Wessling v. Carroll Gas Co.*, 266 F.Supp. 795 (N.D. Iowa); *Oliveira v. Basteiro*, 18 WH Cases 668 (S.D. Texas). See also *Northwest Airlines v. Jackson*, 185 F.2d 74 (C.A. 8); *Walling v. Connecticut Co.*, 154 F.2d 522 (C.A. 2) certiorari denied, 329 U.S. 667, and *Wabash Radio Corp. v. Walling*, 162 F.2d 391 (C.A. 6). 29 CFR 779.308.

Because of experienced and informed judgment, administrative rulings, interpretations and opinions, although not binding upon the court, are entitled to careful consideration and weight. *Wirtz v. Keystone Readers Service, Inc.*, 418 F.2d 249 (1969).

The court concludes that the work of the employees here in dispute is not exempted under the Act, and plaintiff is entitled to the relief prayed for including an injunction against defendants and their agents and all persons in concert or participation with them from violating the provisions

of 15(a)(2) and 15(a)(5) of the Fair Labor Standards Act (29 U.S.C. §215(a)(2) and §215(a)(5)) and the withholding of payment of any overtime compensation determined to be due such employees under the Act, together with interest thereon at the rate of 6% per annum. However, defendants are allowed 30 days from this date in which to respond to plaintiff's computations of overtime pay due such employees, and both parties are ordered to submit to the court within 45 days such computations at which time the court will receive from plaintiff a proposed final decree, including the computation of such sums.

IT IS SO ORDERED.

This, the 7th day of August, 1972.

RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

United States District Court

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

Civil Action File No. 14876

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff.

v.

SIX FLAGS OVER GEORGIA, LTD.
and GREAT SOUTHWEST ATLANTA CORP.,
Defendants.

JUDGMENT

This cause was submitted to this Court sitting without a jury on stipulated facts. The court entered its findings of fact and conclusions of law by Order on August 7, 1972, and directed the parties to submit back wage computations, which have now been received. It is hereby:

ORDERED, ADJUDGED and DECREED that defendants, Six Flags Over Georgia, Ltd. and Great Southwest Atlanta Corporation, their officers, agents, servants, employees and all persons in concert or participation with them be, and they hereby are, permanently enjoined from

violating the provisions of the Fair Labor Standards Act of 1938, as amended [29 U.S.C. 201 et seq.], hereinafter referred to as the Act, in the following manner.

1. Defendants shall not, contrary to Sections 7 and 15(a) (2) of the Act [29 U.S.C. 207 and 215(a) (2)], employ any employee engaged in construction activities in an enterprise engaged in commerce or in the production of goods for commerce, within the meaning of the Act, for workweeks longer than 40 hours unless such employee receives compensation for his employment in excess of 40 hours at a rate not less than one and one-half times the regular rate at which he is employed. It is

FURTHER ORDERED, ADJUDGED and DECREED that the defendants be, and they hereby are, restrained from withholding payment of overtime compensation found due their employees for the periods of employment and in the amounts as set forth in Exhibit "A" attached hereto and made a part hereof. It is

FURTHER ORDERED that within thirty days following entry of this judgment, defendants shall deliver to plaintiff's attorneys a certified or cashier's check payable to "Wage and Hour—Labor" in the total amount set out in Exhibit "A" hereto less deductions required by law as to each employee plus interest thereon at the rate of 6% per annum from the median dates of the periods of employment as to each employee until the back wages are paid. Plaintiff shall distribute the payment received from defendants to the persons named in Exhibit "A" in the respective amounts due each, or to their surviving heir or heirs if that

is necessary, and any money not so paid within a period of one (1) year from the date of receipt thereof, because of inability of either the defendants or plaintiff to locate the proper persons, or because of their refusal to accept it, shall be deposited with the Clerk of this Court who forthwith shall deposit such money with the Treasurer of the United States pursuant to 28 U.S.C. 2041 (1964).

It is FURTHER ORDERED, ADJUDGED and DECREED that the costs of this action be, and they hereby are, taxed against the defendants for which execution may issue.

Dated this 5 day of September, 1972.

Richard C. Freeman
UNITED STATES DISTRICT JUDGE

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2990

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

versus

SIX FLAGS OVER GEORGIA, LTD., and
GREAT SOUTHWEST ATLANTA CORP.,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Georgia

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(February 22, 1973)

Before ALDRICH*, SIMPSON and CLARK,
Circuit Judges.

PER CURIAM: The Secretary of Labor brought this action against Six Flags over Georgia, Ltd. and Great Southwest Atlanta Corp, hereinafter, collectively, GSA, to enjoin alleged violations of the Fair Labor Standards Act and to compel the payment of overtime to certain employees. On a stipulated record both parties moved for summary judgment. The court ruled in favor of the Secretary and GSA appeals.

GSA operates an amusement park at Atlanta, Georgia of very substantial size. During the season it has over 1,600

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*Hon. Bailey Aldrich, Senior Circuit Judge of the First Circuit, sitting by designation.

employees, sharply reduced during the off-season, of which some 100 are engaged in maintenance and repairs. From year to year the park remodels, and erects new structures, new buildings, and new places of entertainment, in order to maintain public interest. This new construction is mostly done during the off-season, much of the work being contracted out. During the off-season GSA pays all of its employees wages within the act, but during the season it does not, by virtue of the exemption afforded by 29 U.S.C. §213(a)(3) to amusement and recreational establishments. During the season a small amount of new work is done by what are normally maintenance employees. It is for this that the Secretary asserts liability.

GSA concedes, as it must, that a general contractor employed by it to do this construction work would not be conducting a recreational establishment. GSA is in no better position. It is the character of the work, not the source of the remuneration, that controls. *Cf. Hodgson v. Colonnades, Inc.*, 5 Cir., 1/16/73 (fact employees "changing the premises" are on hotel payroll irrelevant). The nature of the work is what gives rise to the need for an exemption; the exemption is not a subsidy accorded to an employer because of his principal activities.

Nor does it make any difference that the employee is doing mixed work. In any week that any particular employee does some non-exempt work he is covered fully, not pro rata. *Hodgson v. Wittenburg Livestock Co.*, 5 Cir., 1972, 68 L.C. ¶32,734; *Mitchell v. Hunt*, 5 Cir., 1959, 263 F.2d 913. GSA says that this makes an accounting problem for it. With the legislation on the books, the problem is of its own making.

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2990

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

versus

SIX FLAGS OVER GEORGIA, LTD., and
GREAT SOUTHWEST ATLANTA CORP.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Feb. 22, 1973, 5 Cir., 1973, —— F.2d ——).

(April 10, 1973)

Before ALDRICH,* SIMPSON and CLARK,
Circuit Judges.

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*Hon. Bailey Aldrich, Senior Circuit Judge of the First Circuit, sitting by designation.

PER CURIAM: Upon consideration of the petition for rehearing the opinion of the Court is amended by inserting at the end of the penultimate paragraph, ending at the top of page 3 of the slip opinion, the following language: "The district court warrantably found that this construction was not amusement park work."

The petition for rehearing is otherwise DENIED and no member of this panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, F.R.A.P., Local Fifth Circuit Rule 12) the petition for rehearing en banc is DENIED.

(Exhibit A Omitted)

APPENDIX "B"
STATUTORY PROVISIONS

Sec. 3.

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

(2) is engaged in laundering, cleaning, or repairing clothing or fabrics;

(3) is engaged in the business of construction or reconstruction, or both; or

(4) is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the

premises of such institution, a school for mentally or physically handicapped or gifted children, a preschool, elementary or secondary school, or an institution of higher education (regardless of whether or not such hospital, institution, or school is public or private or operated for profit or not for profit).

Sec. 6 (a) Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates:

(1) not less than $1.40 an hour during the first year from the effective date of the Fair Labor Standards Amendments of 1966 and not less than $1.60 an hour thereafter, except as otherwise provided in this section;

Sec. 7. (a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Sec. 13. (a) The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to—

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools) or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the work-week are devoted to such activities); or

(2) any employee employed by any retail or service establishment (except an establishment or employee engaged in laundering, cleaning, or repairing clothing or fabrics or an establishment engaged in the operation of a hospital, institution, or school described in section 3(s)(4)), if more than 50 per centum of such establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located, and such establishment is not in an enterprise described in section 3(s) or such establishment has an annual dollar volume of sales which is less than $250,000 (exclusive of excise taxes at the retail level which are separately stated). A "retail or

service establishment" shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry; or

(3) any employee employed by an establishment which is an amusement or recreational establishment, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33⅓ per centum of its average receipts for the other six months of such year; or

(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; or

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction

with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulation, order, or certificate of the Secretary issued under section 14; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) any employee employed by an establishment which is a motion picture theater; or

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) any employee or proprietor in a retail or service establishment which qualifies as an exempt retail or service establishment under clause (2) of this subsection with respect to whom the provisions of sections 6 and 7 would not otherwise apply, engaged in handling telegraphic messages for the public under an agency or contract arrangement with a telegraph company where the telegraph message revenue of such agency does not exceed $500 a month; or

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13) any employee employed in planting or tending trees, cruising, surveying, or felling timber, or in preparing or transporting logs or other forestry products to the mill, processing plant, railroad, or other trans-

portation terminal, if the number of employees employed by his employer in such forestry or lumbering operations does not exceed eight; or

(14) any agricultural employee employed in the growing and harvesting of shade-grown tobacco who is engaged in the processing (including, but not limited to, drying, curing, fermenting, bulking, rebulking, sorting, grading, aging, and baling) of such tobacco, prior to the stemming process, for use as cigar wrapper tobacco.

Sec. 13.

(b) The provisions of section 7 shall not apply with respect to—

(1) any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; or

(2) any employee of an employer subject to the provisions of part I of the Interstate Commerce Act; or

(3) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act; or

(4) any employee employed in the canning, processing, marketing, freezing, curing, storing, packing for shipment, or distributing of any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any byproduct thereof; or

(5) any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state; or

(6) any employee employed as a seaman; or

(7) any driver, operator, or conductor employed by an employer engaged in the business of operating a street, suburban or interurban electric railway, or local trolley or motorbus carrier, if the rates and services of such railway or carrier are subject to regulation by a State or local agency; or

(8) any employee employed by an establishment which is a hotel, motel, or restaurant; or any employee who (A) is employed by an establishment which is an institution (other than a hospital) primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises, and (B) receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed; or

(9) any employee employed as an announcer, news editor, or chief engineer by a radio or television station the major studio of which is located (A) in a city or town of one hundred thousand population or less, according to the latest available decennial census figures as compiled by the Bureau of the Census, except where such city or town is part of a standard metropolitan statistical area, as defined and designated by the Bureau of the Budget, which has a total population in

excess of one hundred thousand, or (B) in a city or town of twenty-five thousand population or less, which is part of such an area but is at least 40 airline miles from the principal city in such area; or

(10) any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trailers, trucks, farm implements, or aircraft if employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles to ultimate purchasers; or

(11) any employee employed as a driver or driver's helper making local deliveries, who is compensated for such employment on the basis of trip rates, or other delivery payment plan, if the Secretary shall find that such plan has the general purpose and effect of reducing hours worked by such employees to, or below, the maximum workweek applicable to them under section 7(a); or

(12) any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water for agricultural purposes; or

(13) any employee with respect to his employment in agriculture by a farmer, notwithstanding other employment of such employee in connection with livestock auction operations in which such farmer is engaged as an adjunct to the raising of livestock, either on his own

account or in conjunction with other farmers, if such employee (A) is primarily employed during his workweek in agriculture by such farmer, and (B) is paid for his employment in connection with such livestock auction operations at a wage rate not less than that prescribed by section 6(a)(1); or

(14) any employee employed within the area of production (as defined by the Secretary) by an establishment commonly recognized as a country elevator, including such an establishment which sells products and services used in the operation of a farm, if no more than five employees are employed in the establishment in such operations; or

(15) any employee engaged in ginning of cotton for market, in any place of employment located in a county where cotton is grown in commercial quantities, or in the processing of sugar beets, sugar-beet molasses, sugar-cane, or maple sap, into sugar (other than refined sugar) or syrup; or

(16) any employee engaged (A) in the transportation and preparation for transportation of fruits or vegetables, whether or not performed by the farmer, from the farm to a place of first processing or first marketing within the same State, or (B) in transportation, whether or not performed by the farmer, between the farm and any point within the same State of persons employed or to be employed in the harvesting of fruits or vegetables; or

(17) any driver employed by an employer engaged in the business of operating taxicabs; or

(18) any employee of a retail or service establishment who is employed primarily in connection with the preparation or offering of food or beverages for human consumption, either on the premises, or by such services as catering, banquet, box lunch, or curb or counter service, to the public, to employees, or to members or guests of members of clubs; or

(19) any employee of a bowling establishment if such employee receives compensation for employment in excess of forty-eight hours in any workweek at a rate not less than one and one-half times the regular rate at which he is employed.

APPENDIX "C"

OPINION OF U. S. COURT OF APPEALS FOR THE FIFTH CIRCUIT—HODGSON v. COLONNADES, INC., ETC., ET AL.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-1029

JAMES D. HODGSON, SECRETARY OF LABOR UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellant-Cross Appellee,

versus

COLONNADES, INC., ETC., ET AL.,
Defendants-Appellees-Cross Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(January 16, 1973)

Before COLEMAN, AINSWORTH and DYER, Circuit Judges.

COLEMAN, Circuit Judge: The Secretary of Labor brought suit against Colonnades, Inc., and its president, John D. MacArthur under the Fair Labor Standards Act[1] to enjoin them from violating the Act's minimum wage, overtime, and record keeping provisions and to restrain them from withholding payment of minimum wage and overtime compensation due certain named employees.

The District Court

1. Enjoined Colonnades from violating the Act's overtime requirements[2] as to those of its employees engaged in construction work and from withholding overtime compensation due them in the amount of $6,612.88 including interest;

2. Denied injunctive relief against John D. MacArthur personally;

3. Denied the Secretary's motion to amend his complaint to include some 52 other employees alleged also to have been affected by overtime violations; and

4. Held that prior to the 1966 amendments to the Act the defendants were not within coverage under either Section 203(s)(1), the applicable dollar amount

[1]29 U.S.C. §201, et seq., hereinafter called the Act.

[2]29 U.S.C. §207.

of gross volume of sales, or Section(s)(4), the definition of a construction enterprise.[3]

The District Court found that Colonnades had violated the Act's overtime requirements in that Colonnades' construction employees were not exempt under Section 213(b)(8)[4], the exemption to the overtime provision for any employee of a hotel. The Court further found that Colonnades' construction employees came within the Act for the first time as a result of the 1966 amendments under Section

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[3]Prior to the 1966 Amendments to the Act Section 203(s)(1)stated

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

(1) any such enterprise which has one or more retail or service establishments if the annual gross volume of sales of such enterprise is not less than $1,000,000, exclusive of excise taxes at the retail level which are separately stated and if such enterprise purchases or receives goods for resale that move or have moved across State lines (not in deliveries from the reselling establishment) which amount in total annual volume to $250,000 or more:

and Section 203(s)(4)stated

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person:

(4) any such enterprise which is engaged in the business of construction or reconstruction, or both, if the annual gross volume from the business of such enterprise is not less than $350,000;

[4]Section 213(b)(8), 29 U.S.C. §213(b)(8) states:

The provisions of section 207 of this title shall not apply with respect to—

(8) any employee employed by an establishment which is a hotel . . .

203(s)(1)[5] as amended. By coming within the Act for the first time under the 1966 Amendments, Colonnades' construction employees would be considered "newly covered" and would be subject to the "catch-up provisions" of Section 207(a)(2).[6]

Facts

John D. MacArthur is the principal owner of Colonnades, Inc., which owns and operates hotels in Palm Beach County, Florida. The center of the MacArthur hotel operation is the Colonnades Beach Hotel, fronting the Atlantic Ocean. Five smaller hotels are located nearby and are connected to the main hotel by colonnaded walkways. This hotel complex has 400 guest rooms, a large convention hall accommodating 500 people, a bowling and putting green, swimming pool, dining facilities, and three kitchens. MacArthur purchased the hotel in 1960 or 1961. At that time the hotel was much smaller, with only a little over 100 rooms. MacArthur was advised to tear down the original buildings

[5]Section 203(s)(1) as amended states:

(s) "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person, and which—

(1) during the period February 1, 1967, through January 31, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $500,000 (exclusive of excise taxes at the retail level which are separately stated) or is a gasoline service establishment whose annual gross volume of sales is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated), and beginning February 1, 1969, is an enterprise whose annual gross volume of sales made or business done is not less than $250,000 (exclusive of excise taxes at the retail level which are separately stated);

[6]The District Court erred in its findings of fact and conclusions of law when it stated that "overtime compensation shall be computed with reference to Sections 6(b) and 7(a)(2)." Section 6(b) refers to the minimum wage provisions and not to overtime compensation.

and start over from scratch. He testified that he "decided they were wrong" and "proceeded to fix it up." Extensive construction projects were undertaken. Two major construction projects were the addition of 139 new rooms on top of the main building and the addition of several floors on top of the convention center. These additions were constructed by numerous independent contractors and subcontractors. Also, MacArthur was continually improving and changing the premises. The labor for this constant improvement program was performed by employees on the hotel's payroll. In the joint stipulation the parties agreed that Colonnades' construction employees performed the following tasks:

(a) Applied waterproof stucco to the exterior walls of hotel buildings.

(b) Dug ditches and connected piping for a sprinkler system on the hotel lawn.

(c) Erected forms and poured concrete in those forms to construct an addition to the seawall on the hotel's ocean-front.

(d) Received construction materials from suppliers, moved those materials onto the hotel elevators, and unloaded those materials on upper floors of the hotel for use by employees of outside contractors.

(e) Erected forms and poured concrete to build sidewalks connecting various hotel buildings.

(f) Constructed outside steps to be used as fire escapes on hotel buildings.

(g) Constructed a penthouse apartment on top of the main hotel building, and

(h) Cleaned up construction debris left by employees of various outside independent contractors who were engaged to build four additional floors on the main hotel building.

During the period specified in the complaint (the period since April 7, 1967) the employees named were not paid overtime for workweeks in excess of forty hours.

Both parties appeal from those findings not in their favor.

We affirm the District Court's decision as to:

1. The denial of injunctive relief against John D. McArthur personally, and
2. The finding that Colonnades' construction employees were not subject to the exemption to the overtime provisions of the Act under Section 213(b)(8).

We reverse the District Court's decision as to:

1. The refusal to allow the Secretary to amend his complaint to include additional employees of Colonnades and
2. That Colonnades did not come within the definition of a construction enterprise within Section 203(s)(4).

The Law

A. *Injunctive Relief Against John D. MacArthur*

Section 203(d) defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee . . ."

The Secretary claimed that MacArthur

(1) participated in the day-to-day supervision of the activities giving rise to the violations;

(2) had the authority to hire and fire the employees in question; and

(3) supervised the supervisors.

The Secretary contends that "courts have repeatedly held that corporate officers who have a proprietary interest in their companies and who actively participate in their day-to-day affairs" are proper party defendants under Section 217[7] and can be enjoined from continuing to withhold unpaid wages due to affected employees.

The District Court found that "an injunction directed to MacArthur personally would be inappropriate and unnecessary." It said "the evidence indicated that the management and operations of the hotel were regularly supervised by others."

"Each case must be considered in light of the total situation or whole activity to determine whether an employer-employee relationship exists." *Wirtz v. Lone Star Steel Company*, supra at 669 and *Wirtz v. Soft Drinks of Shreveport, Inc.*, 336 F.Supp. 950, 957 (W.D. La. 1971). The total employment situation should be considered in regard to the acts MacArthur performed "in the interest of the employer in relation to the employee," *Schultz v. Chalk-Fitzgerald Construction Co.*, supra at 1257. Also to be considered are

[7]Section 217, 29 U.S.C. §217 is the applicable statute for injunctive proceedings under the Fair Labor Standards Act.

the "economic realities" of the situation, *Goldberg v. Whittaker House Cooperative*, 366 U.S. 28, 33, 81 S.Ct. 933, 936, 6 L.Ed.2d 100 (1961).

We are not inclined to reverse the action of the District Court as to MacArthur personally. As to the corporation, the injunction should not be disturbed.

B. *The Section 213(b)(8) Exemption*

Section 213(b)(8) provides as follows:

> The provisions of Section 207 (overtime) shall not apply with respect to any employee employed by an establishment which is a hotel . . .

The District Court held as to the employees here involved that Colonnades was not within the exemption. It found as follows:

> The Colonnades is not an unusual or a typical hotel from the standpoint of the services and facilities it provides for its guests. *The hotel is unusual, however, in that a full-time crew is maintained for the principal purpose of building, remodeling, and rendering substantial alterations to the premises . . . (Colonnades claims) that the hotel's unusual policy of continuing renovation and change should not cause it to lose the exemption.*
>
> In the court's view the central flaw of this argument is the assumption that the 'unusual' policies of this particular hotel are immaterial to the exemption. *The primary function of the construction crew had little if anything to do with the daily operation of the hotel as a*

facility for the accommodation of guests. A hotel is essentially a service facility. The 13(b)(8) exemption contemplates that the duties of the establishment's employees will be reasonably related to and directed toward that end.

The literal interpretation and application of the exemption which the hotel urges runs contrary to the over-all purpose of the Act and the exemption itself.

The record amply supports this view. Whether employees are exempt from the requirements of the Fair Labor Standards Act involves a question of fact. *Walling v. General Industries Co.*, 330 U.S. 545, 550, 67 S.Ct. 883, 885, 91 L.Ed. 1088 (1947) and *Hodgson v. Klages Coal and Ice Co.*, 6 Cir. 1970, 435 F.2d 377, 382, cert. den. 402 U.S., 973, 91 S.Ct. 1660, 29 L.Ed.2d 137. Therefore, the findings of fact made by the District Court may not be set aside unless clearly erroneous. *Walling v. General Industries Co.*, supra at 550; *Hodgson v. Klages Coal and Ice Co.*, supra at 382, and *Wirtz v. Atlanta Life Ins. Co.*, 6 Cir., 1963, 311 F.2d 646, 647.

An exemption from the coverage of the Act "must be narrowly construed." *Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 808, 89 L.Ed. 1095 (1945) and *Mitchell v. Stenson*, 1 Cir., 1954, 217 F.2d 210, 214. The exemptions must be applied only to those "plainly and unmistakably within its terms and spirit." *Phillips, Inc. v. Walling*, supra at 493. See too *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 456, 4 L.Ed.2d 393 (1960). This strict construction of the exemption requires

that it not be extended to another business merely because the principal business of the employer is exempted, *Walling v. Connecticut Co.*, 62 F.Supp. 733, 735 (D.C. Conn. 1945), affirmed 2 Cir., 1946, 154 F.2d 552.

Therefore, we agree that Colonnades' construction employees[8] did not come within the Section 213(b)(8) exemption.

C. *Amending the Complaint*

The plaintiff's original complaint asked for relief for 64 employees. During the trial, the plaintiff sought to amend the complaint to add an additional 63 employees. This would involve approximately $27,000 additional in back wages.

The original list of 64 names resulted from a list submitted to a Wage and Hour Compliance Officer prior to the filing of the complaint. The plaintiff sought to obtain from the defendant its payroll records,[9] granted by the District Court. The payroll records were inspected. From these records the plaintiff was able to uncover all the names of the construction workers employed during the pertinent period, as well as the information necessary to compute the full extent of the wage underpayments. The trial began on November 16, 1972. The trial court denied the plaintiff's motion to amend, stating that no case "cited to the court supports the motion that the complaint may be so drastically amended on the day of the trial."

[8]The Fair Labor Standards Act may be applied to a part of an employer's business. Davis v. Goodman Lumber Co., 4 Cir., 1943, 133 F.2d 52, 54 and cases cited therein.

[9]Rule 34, F.R. Civ. P.

Colonnades claims that up to trial it treated the suit as "a $6,000 lawsuit involving 50 people." It then states that if the plaintiff had amended his complaint prior to trial, Colonnades would have "prepared for a $35,000 lawsuit involving substantially over 100 employees, but (it) had no way of knowing if any additional employees would be added."

The applicable part of Rule 15(b) states:

> If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The Court may grant a continuance to enable the objecting party to meet such evidence.

An amendment of a complaint will be allowed "unless the opposing party is actually prejudiced." 3 Moore's Federal Practice, §15.14 at p. 1011 (2d ed. 1968). This prejudice must "put the objecting party to some serious disadvantage," and "it is not enough that (the objecting party) advances an imagined grievance or seeks to protect some tactical advantage." Wright & Miller, Federal Practice and Procedure: Civil §1495. Thus, the party opposing the amendment "must be seriously prejudiced" in his "defense on the merits." *Id.*

Colonnades does not make any allegation as to how it was prejudiced in its defense except for its vague statement that it would have defended the case differently if it had known more money or a greater number of employees were involved.[10]

The issue on this point was really one of mathematical computation. Colonnades had the records in its possession. The identity of the employees and their hours of work were there set forth.

The District Court should have allowed the amendment, *Shultz v. Mack Farland & Sons Roofing Co.*, 5 Cir., 1969, 413 F.2d 1296, 1302 and *Monod v. Futura, Inc., 10 Cir., 1969, 415 F.2d 1170, 1174.*

D. *Inclusion of Colonnades under Section 203(s)(4)*

The District Court held that Colonnades did not come within the "old" Section 203(s)(4) as a construction enterprise. Unpaid overtime compensation was therefore computed under Section 207(a)(2), which covers newly covered employees who come within the Act for the first time under the 1966 Amendments. The District Court held that Colonnades came within the Act for the first time under the 1966 Amendments by virtue of Section 203(s)(1) as amended:

> "The plaintiff makes much of the fact that the defendant had expenditures for construction in excess of $350,000 during the relevant periods. But this does not

[10]If Colonnades had been seriously prejudiced and could show it, the District Court under Rule 15(b), F.R. Civ. P. could have granted Colonnades a continuance to meet the changed situation so that Colonnades could have cured the prejudice.

> mean at all that the hotel was in the business of construction. To the contrary, it was at all times engaged in the business of operating a hotel. The hotel had no profit or receipts of any kind from construction. Its construction activities consisting solely of expanding and modernizing existing structures and facilities for its own account. The court finds and concludes that the defendant hotel was not and is not engaged in the business of construction within the meaning of the Act."

Colonnades claims that:

> (It) was not engaged in 'the business of construction.' It was engaged in the business of operating a hotel. Any 'construction' activities consisted simply of expanding and modernizing the existing functioning hotel and were incidental to the business of operating the hotel—not a separate business activity.

Colonnades' annual gross volume must exceed $350,000 from the construction business for Colonnades to come within the "old" Section 203(s)(4).[11] Colonnades stipulated that in every year in question there was "in excess of $350,000 in addition to our capital assets on the premises."

"Annual gross volume" should not be narrowly construed. *Wirtz v. Allen Green & Associates, Inc.*, 6 Cir., 1967, 379 F.2d 198, 200. The Court in *Allen Green* said that "annual gross volume" does not mean sales and agreed with the District Court below that it meant "any gain of

[11]See note 3 supra.

capital assets derived from construction activities . . . to the extent of their fair market value, irrespective of whether the assets were in the form of money or its equivalent in property." *Wirtz v. Allen Green & Associates, Inc.*, supra at 199. The Court in *Allen Green* said it was the purpose of Congress to "include in the coverage of the Act employees of construction contractors who build for themselves as well as those who build for others." *Wirtz v. Allen Green & Associates, Inc.*, supra at 200. Therefore, we must hold that the District Court construed too strictly the definition of "business' in Section 203(s)(4).

The District Court on remand will compute the overtime compensation due to the affected employees under Section 207(a)(1).

Affirmed in part, Reversed in part, and Remanded for proceedings not inconsistent with this opinion.